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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

UNITED STATES

2014 JAN 22 PM 4:11

FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C. CLERK OF COURT

IN RE APPLICATION OF THE
FEDERAL BUREAU OF INVESTIGATION
FOR AN ORDER REQUIRING THE
PRODUCTION OF TANGIBLE THINGS

Docket Number: BR 14-01

PETITION

appears and petitions this Court pursuant to Title 50, United States Code, Section 1861(f)(2)(A) and Rule 33 of the Foreign Intelligence Surveillance Court Rules of Procedure to vacate, modify, or reaffirm the production order issued January 3, 2014. In support of its petition, the following factual and legal grounds.

Derived from: Pleading in Docket BR 14-01

Declassify on:

(Classification is provisional pending government review)

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FACTUAL BACKGROUND

On January 3, 2014, [REDACTED] a production order issued by this Court pursuant to 50 U.S.C. § 1861(c). In all material respects, the January 3, 2014 order (a copy of which is attached as Exhibit 1) is identical to § 1861 production orders previously issued to and served [REDACTED] has complied with the January 3, 2014 production order, as it has with all previous orders issued pursuant to this authority.

[REDACTED] Klayman v. Obama, Civil Action No. 130851 (RJL) (D.D.C. June 6, 2013). In Klayman, the plaintiffs alleged, among other things, that the § 1861 order issued by this Court to Verizon on April 25, 2013 (and subsequently made public) was constitutionally flawed. On December 16, 2013, Judge Leon issued a Memorandum Opinion (a copy of which is attached as Exhibit 2) in Klayman in which he concluded that the “bulk collection” authorized by the April 25, 2013 order served on Verizon was “indeed an unreasonable search under the Fourth Amendment.” See Memorandum Opinion at 62. Judge Leon further directed that the government cease collecting “any telephony metadata associated with [the Klayman plaintiffs’] personal Verizon accounts.” See Memorandum Order at 67. The judge then stayed his own order pending appeal “in light of the significant national security interests at stake in this case and the novelty of the constitutional issues.” Id.

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LEGAL ARGUMENT

The present petition arises entirely from [REDACTED] Judge Leon's Memorandum Order. [REDACTED] previous § 1861 production orders as part of the government's bulk collection program. [REDACTED] this Court has upheld the legality of this program, in large part by reliance on the holding in Smith v. Maryland, 442 U.S. 735 (1979) that there is no reasonable expectation of privacy in telephony metadata collected with a pen register.¹ [REDACTED] is familiar with the development of the statutory language in § 1861 and with the operational application of this provision to bulk collection activities. [REDACTED] has always acted in good faith when complying with § 1861 orders, and such compliance falls squarely within the provisions of 50 U.S.C. § 1861(e).

Judge Leon's Memorandum Opinion introduces, for the first time, a question about the legal validity of an order issued by this Court under § 1861. In the Klayman matter, the district court examined an actual § 1861 order served on Verizon and asserted jurisdiction to review the plaintiffs' constitutional claims arising from that order. See Memorandum Opinion at 31-34. Judge Leon received extensive factual submissions and legal argument from the government. In addition, he explicitly considered Smith v. Maryland and its progeny, along with the public versions of this Court's and the Foreign Intelligence Court of Review's opinions relating to bulk collection activities. Judge Leon rejected the government's arguments and, after a lengthy analysis, found the holding in

¹ The only opinions of this Court that [REDACTED] possession, however, are redacted opinions that the Court has released to the public. Only secondary orders of this Court are served [REDACTED] not primary orders that may contain the legal reasoning that underpin the Court's order that [REDACTED]

Smith to be inapplicable to the specific activities mandated by the § 1861 order at issue in the Klayman litigation. See Memorandum Order at 42-56.

Given [REDACTED]
[REDACTED]

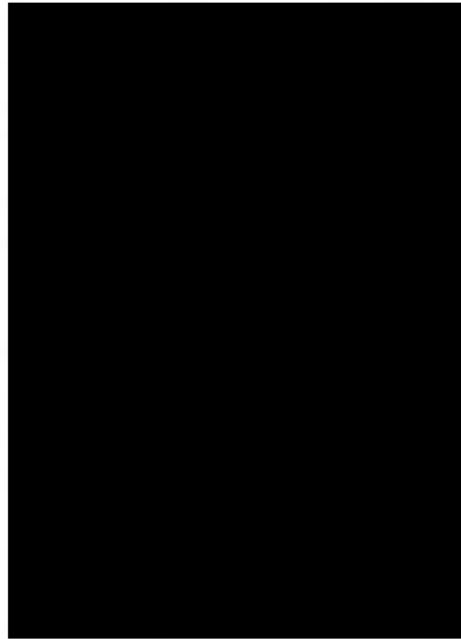
[REDACTED] It may well be the case that this Court, in issuing the January 3, 2014 production order, has already considered and rejected the analysis contained in the Memorandum Order. [REDACTED] not been provided with the Court's underlying legal analysis, however, nor [REDACTED] been allowed access to such analysis previously, and the order [REDACTED] does not refer to any consideration given to Judge Leon's Memorandum Opinion. In light of Judge Leon's Opinion, it is appropriate [REDACTED] inquire directly of the Court into the legal basis for the January 3, 2014 production order, and [REDACTED] a Rule 33 petition is the appropriate mechanism to accomplish this inquiry. [REDACTED] petitions this Court, pursuant to 50 U.S.C. § 1861(f)(2)(A) and FISC Rule 33 to vacate, modify, or reaffirm the current production order in light of the Memorandum Opinion issued in Klayman v. Obama on December 16, 2013.

[REDACTED] not requesting a stay of the January 3, 2014 production order [REDACTED] will continue to comply fully with that order unless otherwise directed by the Court.

[REDACTED] not requesting a hearing in this matter. Pursuant to FISC Rule 63, the undersigned attorneys request permission to represent [REDACTED] and have the attached the required bar membership and security information as Exhibit 3.

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Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of [REDACTED]
[REDACTED] including all exhibits, have been served this day by hand delivery on:

[REDACTED]
U.S. Department of Justice
Litigation Security Group
2 Constitution Square
145 N Street, N.E.
Washington, D.C. 20530
[REDACTED]

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 22nd day of January, 2014.

[REDACTED]

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EXHIBIT 1

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KLAYMAN et al.,

Plaintiffs,

v.

OBAMA et al.,

Defendants.

Civil Action No. 13-0851 (RJL)

FILED

DEC 16 2013

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

KLAYMAN et al.,

Plaintiff,

v.

OBAMA et al.,

Defendants.

MEMORANDUM OPINION

December 16, 2013 [Dkt. # 13 (No. 13-0851), # 10 (No. 13-0881)]

On June 6, 2013, plaintiffs brought the first of two related lawsuits challenging the constitutionality and statutory authorization of certain intelligence-gathering practices by the United States government relating to the wholesale collection of the phone record metadata of all U.S. citizens.¹ These related cases are two of several lawsuits² arising

¹ Plaintiffs' second suit was filed less than a week later on June 12, 2013, and challenged the constitutionality and statutory authorization of the government's collection of both phone and Internet metadata records.

² The complaint in *ACLU v. Clapper*, Civ. No. 13-3994, which was filed in the United States District Court for the Southern District of New York on June 11, 2013, alleges claims similar to

EXHIBIT 3

